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**IN THE
COURT OF APPEALS OF INDIANA**

CHARLES L. WATHEN,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 31A01-0602-PC-63

APPEAL FROM THE HARRISON SUPERIOR COURT

The Honorable Roger D. Davis, Judge

Cause No. 31D02-0506-PC-3

August 23, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Charles L. Wathen (Wathen), appeals the denial of his Petition for Post-Conviction Relief.

We affirm.

ISSUE

Wathen raises one issue on appeal, which we restate as: Whether Wathen's guilty plea was knowingly and intelligently made when the trial court did not present the advisement and waiver of his rights orally.

FACTS AND PROCEDURAL HISTORY

On April 30, 1998, the State filed an Information charging Wathen with Count I, operating a vehicle while intoxicated, a Class C misdemeanor, Ind. Code § 9-30-5-1; Count II, operating a vehicle while intoxicated, a Class A misdemeanor, I.C. § 9-30-5-2; Count III, operating a vehicle while intoxicated second offense, a Class D felony, I.C. § 9-30-5-3; Count IV, driving while suspended, a Class A misdemeanor, I.C. § 9-24-18-5(B); and Count V, operating a vehicle while being an habitual traffic offender, a Class D felony, I.C. § 9-30-10-16.

On September 21, 1998, Wathen signed a Class D Felony Written Waiver Advisement and Waiver of Rights form (Written Advisement). By signing the Written Advisement, Wathen indicated he understood, among other things, that he was charged with a Class D felony, the minimum and maximum sentences available, and how the sentences may be imposed, *i.e.* concurrent or consecutive. Additionally, the form explained his right to be represented by an attorney, to a public and speedy trial, to

confront and cross-examine witnesses, the right to subpoena witnesses, to require the State prove him guilty beyond a reasonable doubt at a trial where he did not have to testify, and the right to appeal, and that he was giving up those rights by pleading guilty.

On March 1, 1999, Wathen pled guilty to Counts III and V. At the guilty plea hearing, the trial court asked Wathen whether he had read, signed, and discussed the Written Advisement and plea agreement with his attorney. Wathen responded affirmatively. The trial court also asked Wathen whether he had any questions and if he understood his constitutional rights and the possible penalties he faced. Wathen responded that he had no questions and understood his constitutional rights and the possible penalties. The trial court then explained to Wathen the possible consequences of the habitual sentence offender and habitual traffic offender laws. The trial court asked Wathen if anyone threatened or forced him to plead guilty. Wathen indicated he was pleading guilty of his own free will. The trial court then found Wathen knowingly and voluntarily made the guilty plea, there was a factual basis for both counts, and accepted the guilty plea.

The trial court sentenced Wathen to three years on Count III with one year suspended, and one and a half years on Count V with six months suspended. The trial court ordered the sentences served consecutive to one another and consecutive to Wathen's other case. Plus, the trial court ordered an additional two and a half years be served on probation.

On June 29, 2005, Wathen filed a Petition for Post-Conviction Relief claiming he was not advised of the possibility of consecutive sentences, the nature of the criminal

charges and sanctions, his limited right to appeal, or the applicable sentencing range. Furthermore, he claims he was not orally advised of his constitutional rights. A hearing was held on September 1, 2005, and a month later the post-conviction court issued its findings of fact and conclusions of law denying Wathen's Petition.

Wathen now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Wathen claims the post-conviction court erred in denying his Petition for Post-Conviction Relief. Specifically, Wathen asserts that when he pled guilty the trial court should have orally advised him of the constitutional rights he was waiving, not merely relied on the written waiver.

Post-conviction hearings do not afford defendants the opportunity for a "super appeal." *Moffitt v. State*, 817 N.E.2d 239, 248 (Ind. Ct. App. 2004). The petitioner has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *see also id.* Because Wathen is appealing from a negative judgment, to the extent his appeal turns on factual issues, he must provide evidence that as a whole unerringly and unmistakably leads us to believe there is no way within the law that a post-conviction court could have denied his post-conviction relief petition. *See id.*; *see also Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied, cert. denied*. It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*.

Wathen contends that because he was not orally advised of the constitutional rights waived by pleading guilty his plea and conviction should be set aside. In *Boykin v. Alabama*, 395 U.S. 238 (1969), the United States Supreme Court held that it was reversible error for a trial judge to accept a petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary. See *Hall v. State*, 849 N.E.2d 466, 469 (Ind. 2006) (citing *Boykin*, 395 U.S. at 242). More particularly, *Boykin* requires that the record must show, or there must be an allegation and evidence which show, that the defendant was informed of, and waived, three specific federal constitutional rights: the privilege against compulsory self-incrimination, right to trial by jury, and the right to confront one's accusers. *Hall*, 849 N.E.2d at 469 (citing *Boykin*, 395 U.S. at 243).

Wathen refers us to *Maloney v. State*, 684 N.E.2d 488 (Ind. 1997), which states “Indiana’s statutes require a public and oral dialogue with defendants pleading guilty to felonies....” *Id.* at 491; see I.C. § 35-35-1-2. Our review of the record confirms that the trial court did not formally advise Wathen he was waiving his *Boykin* rights by pleading guilty, nor did Wathen formally waive his *Boykin* rights. However, *Boykin* “does not require that the record of the guilty plea proceeding show that the accused was formally advised that entry of his guilty plea waives certain constitutional rights,” nor does *Boykin* require that the record contain a formal waiver of these rights by the accused. *Dewitt v. State*, 755 N.E.2d 167, 171 (Ind. 2001) (quoting *State v. Eiland*, 707 N.E.2d 314, 318 (Ind. Ct. App. 1999), *reh’g denied*). Rather, Wathen must only have known that he was waiving his *Boykin* rights by pleading guilty.

It is clear from the record that Wathen knew he was waiving his *Boykin* rights by pleading guilty. The Written Advisement Wathen signed indicated:

8. You have the right to a public and speedy trial by jury; the right to confront and cross-examine witnesses against you; the right to subpoena witnesses at no cost; the right to require that the State prove you guilty beyond a reasonable doubt at a trial at which you do not have to testify[,] but in which you may testify if you wish; and the right to appeal any decision made by the judge. By pleading guilty you will give up and waive each and every one of these rights.

(Appellant's App. p. 60). Furthermore, the following dialogue ensued between the trial court and Wathen at the guilty plea:

[TRIAL COURT]: Did you read, sign, and discuss with your attorney the plea agreement and written advisement and [waiver of] rights paperwork in both cases?

[WATHEN]: Yes.

[TRIAL COURT]: Do you have any questions about anything included in the paperwork on either case?

[WATHEN]: No.

[TRIAL COURT]: Specifically, do you understand your constitutional rights, as well as the possible penalties for the offenses you're pleading guilty to, all of them in both cases?

[WATHEN]: Yes.

(Appellant's App. pp. 27-28.) Thus, we find the trial court engaged in sufficient face-to-face discussion and advisement of rights to conclude Wathen intelligently and voluntarily waived his *Boykin* rights by pleading guilty.

CONCLUSION

Based on the foregoing, we find the denial of Wathen's Petition for Post-Conviction Relief was proper.

Affirmed.

VAIDIK, J., and DARDEN, J., concur.